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Nos. 80-415 and 80-1239

In the Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION, APPELLANT

v.

WILLIAM M. GIBBONS, TRUSTEE, ET AL.

ON CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS AND THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL APPELLEES

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TABLE OF AUTHORITIES

Page

Cases:

Brooks-Scanlon Co. v. *Railroad Commission*, 251 U.S. 396 ..... 2, 3

Chicago, Rock Island & Pacific R. R., Nos. 80-1788, 80-2199 and 80-2286 (7th Cir. Oct. 13, 1981) 5

Continental Illinois National Bank & Trust Co. v. *Chicago Rock Island & Pacific Ry.*, 294 U.S. 648 6

Dames & Moore v. *Regan*, No. 80-2078 (July 2, 1981) 8

Gibbons v. *United States*, 660 F. 2d 225 3

Gibbons v. *United States*, Nos. 80-2009, 80-2010, 80-2455 and 81-1026 (7th Cir. Oct. 22, 1981) 3

Hanover National Bank v. *Moyses*, 186 U.S. 181 6

Hodel v. *Virginia Surface Mining & Reclamation Association*, Nos. 79-1538, 79-1596 (June 15, 1981) 6, 10

Hooe v. *United States*, 218 U.S. 322 10

Lehigh & New England Ry. v. *ICC*, 540 F. 2d 71, cert. denied, 429 U.S. 1061 2

New Haven Inclusion Cases, 399 U.S. 392 2

New York, Susquehanna & Western R. R., 504 F. Supp. 851, aff'd per curiam, No. 80-1121 (3d Cir. Nov. 16, 1981) 7

Page

Cases—(Continued):

Pope v. *United States*, 323 U.S. 1 8

Railroad Retirement Board v. *Alton R. R.*, 295 U.S. 330 9

Regional Rail Reorganization Act Cases, 419 U.S. 102 ..... 6, 10

United States v. *Klein*, 80 U.S. (13 Wall.) 128 7

United States v. *Lowden*, 308 U.S. 225 ..... 4, 6

United States v. *Sioux Nation of Indians*, 448 U.S. 371 8

Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 9

Valuation Proceedings Under §§ 303(c) & 306 of the Regional Rail Reorganization Act, In re, 439 F. Supp. 1351 2

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 10

Constitution, statute and rules:

United States Constitution:

Article I, Section 8, Clause 3 (Commerce Clause) 6
Article I, Section 8, Clause 4 6

Fifth Amendment:

Due Process Clause 7, 8, 9
Just Compensation Clause 9

28 U.S.C. 2101(a) 1

Page

Constitution, statute and rules—(Continued):

Fed. R. App. P.:

Rule 1(a) 1
Rule 12(a) 1

Sup. Ct. R. 12 2

Miscellaneous:

Advisory Comm. Note to Fed. R. App. P. 4(a)(4), 28 U.S.C. (Supp. III) 2

H.R. Conf. Rep. No. 1041, 96th Cong., 2d Sess. (1980) 6-7

H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. (1980) 4, 7

H.R. Rep. No. 96-839, 96th Cong., 2d Sess. (1980) 5

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1. The private appellees' contention (Br. 2-3) that this Court lacks jurisdiction of the appeal in No. 80-415 is without merit. Both the notice of appeal and the jurisdictional statement were timely filed in accordance with 28 U.S.C. 2101(a) and the Rules of this Court. The Federal Rules of Appellate Procedure, on which the private appellees rely, apply to appeals to the courts of appeals, not to this Court. See Fed. R. App. P. 1(a). Thus, there is no rule that nullifies a notice of appeal to this Court when a motion to vacate is filed, and there is no reason to imply such a rule.[1] In any event, as we noted in our opening brief (Br. 9-10 n.9), the injunction challenged in No. 80-415 was mooted by passage of the Staggers Rail Act and has no continuing effect.

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[1]The filing of a notice of appeal to the court of appeals dockets the appeal (see Fed. R. App. P. 12(a)), and the appeal will then proceed

2. The private appellees' argument that the labor protection provisions of the Rock Island Act effect a taking rests primarily on a misinterpretation of one case, *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920). The private appellees repeatedly assert (Br. 25-28, 33-34, 40) that at a certain point *Brooks-Scanlon* "absolves a railroad from expending its funds or consuming its assets in the public interest" (Br. 25), and they contend that that point was reached here when the district court determined that the Rock Island could not be reorganized as an operating railroad. But *Brooks-Scanlon* holds only that a railroad may not be forced to continue operations indefinitely once it is determined that the railroad cannot be reorganized on a profit-making basis. That determination of unreorganizability, however, does not instantly relieve a railroad of all of its existing common carrier obligations, even though the satisfaction of those obligations may require the expenditure of funds that would otherwise be available to the creditors of the estate. It simply entitles the railroad to cease operations within a reasonable period of time upon the receipt of a certificate of abandonment.[2] See *New Haven Inclusion Cases*, 399 U.S. 392, 461 (1970); *Lehigh & New England Ry.* v. *ICC*, 540 F. 2d 71, 82-83 (3d Cir. 1976), cert. denied, 429 U.S. 1061 (1977).

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unless the notice of appeal is withdrawn. It is therefore a sensible rule of practice for the notice of appeal to be nullified if further review is sought in the lower court. See Advisory Comm. Note to Fed. R. App. P. 4(a)(4), 28 U.S.C. (Supp. III). In this Court, however, an appeal is not docketed until the jurisdictional statement is filed (see Sup. Ct. R. 12), and there is thus no reason to nullify a notice of appeal that has been filed where the appeal has not yet been docketed.

[2]As we explained in our opening brief (Br. 27), even a railroad found to be unreorganizable may be required to continue operating at a loss for some period of time in order to permit an examination of alternatives to total abandonment. See *In re Valuation Proceedings Under §§ 303(c) & 306 of the Regional Rail Reorganization Act*, 439 F. Supp. 1351, 1371 (Spec. Ct. 1977).

The private appellees' interpretation of *Brooks-Scanlon* has recently been rejected emphatically by the Seventh Circuit in a series of cases affirming Commission orders authorizing other rail carriers to provide service over Rock Island lines. The private appellees argued there that these directed service orders constituted a taking because the Rock Island has been declared "cashless" and unreorganizable and therefore was relieved of its common carrier obligations. The court of appeals held that "even if the Rock Island cannot operate, it must still fulfill its obligations under the Interstate Commerce Act." *Gibbons* v. *United States*, 660 F. 2d 225, 229 (7th Cir. 1981). See also *Gibbons* v. *United States*, Nos. 80-2009, 80-2010, 80-2455 and 81-1026 (7th Cir. Oct. 22, 1981), slip op. 4, 7; *Gibbons* v. *United States*, Nos. 79-2413, 80-1111, 80-1383 and 80-1538 (7th Cir. Oct. 7, 1981), slip op. 13-16. Thus, the district court's finding that the Rock Island cannot be reorganized does not immediately terminate its obligations to act in the public interest.[3]

Labor protection is an existing common carrier obligation for which a railroad remains responsible even if it cannot be reorganized. The private appellees object, however, that the requirement that the Rock Island pay labor protection to its separated employees requires the "moribund Rock Island" to expend funds in furtherance of the national transportation policy although it no longer participates as a carrier (Br. 27-28) and that the labor protection

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[3]The Commission found the Rock Island to be "cashless" on September 26, 1979, and the reorganization court authorized the abandonment of the railroad on June 2, 1980. The *Gibbons* cases hold that neither of these events terminated the Rock Island's public service obligations. The cases cover directed service orders that were effective (1) between October 1979 and March 1980; (2) between March 1980; and (3) beginning in May 1980 and May 1980; and continuing well beyond the date of the district court's June 2, 1980, order.

plan does not further the public interest (Br. 43-44). These objections ignore the benefits to the estate under the legislation at issue here—*e.g.*, the availability of a federal loan for funding the labor protection expense and the expedited review process that minimizes delay that might erode the estate. See H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 138 (1980). But more fundamentally, these assertions rest on a misunderstanding of the role of labor protection in furthering the national transportation policy.

The expectation that labor protection will be paid promotes the stability of the work force. It ensures that, in times of economic distress in the railroad industry, employees will not leave their jobs to look for other work because they know they have some protection if their jobs are eliminated. See *United States* v. *Lowden*, 308 U.S. 225, 236 (1939). During the many years of its existence, particularly in recent years when it was known to be in financial trouble, the Rock Island reaped the benefits of this stability. Labor protection that is paid now when its employees are separated is simply a fulfillment of a longstanding obligation that arose during the Rock Island's years of service; it is not a "wholly new" (Br. 34) obligation that furthers some current transportation policy from which the Rock Island derives no benefit. Indeed, the Rock Island's employee protection obligation, which was a known condition attached to its participation in the railroad industry, would be a nullity if the railroad were released from its obligation upon the occurrence of the very event that triggers the need for protection—economic difficulties that result in elimination of the employees' jobs. To release the railroad from its labor protection obligations in the event of a liquidation would destroy the employees' security in their railroad jobs and the consequential work force stability that is critical to the national transportation policy. Moreover, as Congress pointed out, it would "promote liquidations to the detriment of the employees and the public interest." H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 138-139 (1980).

The private appellees also contend (Br. 28-34, 39-40) that the imposition of a labor protection obligation upon a whole line abandonment constitutes a taking because of the degree to which it interferes with their investment-backed expectations. This contention rests primarily on the fact that the Commission historically has refrained from imposing labor protection in most whole line abandonments. As explained in our opening brief (Br. 29-31), however, the Commission's prior policy gave no assurance that it would not exercise its discretion to impose labor protection in the case of an abandonment of the Rock Island, one of the nation's major railroads. Moreover, Congress had enacted legislation in 1976 and 1979 that, on its face, appeared to require the imposition of labor protection in the case of an abandonment. While the reorganization court, recently affirmed by the court of appeals (*In re Chicago, Rock Island & Pacific R. R.*, Nos. 80-1788, 80-2199 and 80-2286 (7th Cir. Oct. 13, 1981)), interpreted the statute as giving it discretion to decline to impose labor protection, that interpretation is open to question (see H.R. Rep. No. 96-839, 96th Cong., 2d Sess., Appendix II, 63-66 (1980)), and the creditors of the Rock Island could hardly have counted on such an interpretation. In short, while investors in the Rock Island had reason to hope that labor protection would not be imposed in the event of an abandonment, Congress' contrary decision did not destroy any legitimate investment-backed expectations of theirs such that it should be characterized as a taking. Rather, the labor protection provisions of the Rock Island Act are simply an exercise of Congress' regulatory power.

3. The private appellees raise in defense of the judgment below several constitutional objections not relied on by the district court. These arguments are insubstantial.

a. Contrary to the private appellees' contention (Br. 50-53), the Rock Island Act does not violate the requirement in

Article I, Section 8, Clause 4 of the Constitution that Congress establish "uniform Laws on the subject of Bankruptcies through the United States." First, the Act is not a law on the subject of bankruptcies. It does not concern the relations between an insolvent debtor and his creditors (see *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry.*, 294 U.S. 648, 672-673 (1935)), but rather concerns the obligations of a common carrier to shield its employees from economic loss in furtherance of the national transportation policy. Thus, the Act is clearly an exercise of congressional power under the Commerce Clause. See *United States* v. *Lowden, supra*, 308 U.S. at 239-240. As explained in our opening brief (Br. 22-24), the Act indisputably was a rational response by Congress to the rail service crisis in the Midwest, and hence it is a legitimate exercise of the Commerce Power. See, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Association*, Nos. 79-1538, 79-1596 (June 15, 1981), slip op. 9-10.

Even assuming that the uniformity requirement applies to the Rock Island Act, it is violated only when a statute treats two entities differently on a geographical basis. See *Hanover National Bank* v. *Moyses*, 186 U.S. 181, 188 (1902). As the private appellees acknowledge (Br. 51), a statute directed at railroads in a particular geographical region does not violate the uniformity requirement when there is a geographically isolated problem. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159 (1974). Here, the Rock Island Act was passed to deal with the specific problems caused by the collapse of the Rock Island. To the extent that these problems are analogous to those faced by other railroads, Congress has indicated that there will not be disparate treatment. The employee protection provisions of the Rock Island Act were specifically "patterned after the Milwaukee Railroad Restructuring Act." H.R. Conf. Rep.

No. 96-1041, 96th Cong., 2d Sess. 25 (1980).[4] And Congress noted in its consideration of the Staggers Act that "it is the intention of Congress that employee protection is imposed in bankruptcy proceedings involving major rail carriers." H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 138-139 (1980).[5] Hence, there is no uniformity problem. For the same reasons, to the extent that the Rock Island Act is construed as creating a classification, it is one that has a rational basis and, contrary to the private appellees' contention (Br. 53-55), does not violate the equal protection component of the Due Process Clause.

b. The private appellees contend (Br. 45-49), primarily in reliance on *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871), that the labor protection provisions of the amended Rock Island Act contravene the doctrine of separation of powers because they represent an effort to direct the ultimate outcome of a pending case. This contention reflects a misconstruction of both *Klein* and the Act.

As we have shown in our opening brief (Br. 29-30), the Commission has always had the power, conferred by statute, to require the implementation of employee protection plans as a condition on approval of whole line abandonments. Congress is surely free, in response to its perception

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[4]The fact that the private appellees consider the situations of the Milwaukee and the Rock Island to be distinguishable (see Br. 52 n.27) hardly indicates that the statute fails for lack of uniformity.

[5]Congress' failure to impose a labor protection obligation on the New York, Susquehanna, and Western Railroad does not require a finding that the Rock Island Act violates the uniformity requirement. The Constitution does not forbid the drawing of rational distinctions between different classes of railroads. The Susquehanna is a tiny railroad with few employees. *In re New York, Susquehanna & Western R. R.*, 504 F. Supp. 851, 855, 858 (D. N.J. 1980), aff'd per curiam, No. 80-1121 (3d Cir. Nov. 16, 1981). The Commission traditionally has not imposed labor protection in connection with abandonments of such minor carriers, and Congress has expressly indicated its desire to distinguish between major carriers like the Rock Island and minor carriers like the Susquehanna. See *id.* at 863.

of a threatened impact on interstate commerce, to particularize its delegation of power to the Commission on this subject and to enact companion measures, such as the loan guarantee and the expedited process for judicial review. Congress does not unconstitutionally infringe on the judicial power by thus clarifying and supplementing the applicable law, even while a case is pending. See *Dames & Moore* v. *Regan*, No. 80-2078 (July 2, 1981), slip op. 26.

This is not an instance, like *Klein*, in which Congress sought to require the "dismissal of [a] suit in which the Court of Claims had given judgment for the claimant." *Pope* v. *United States*, 323 U.S. 1, 8 (1944). Far from "discarding [a] final judgment[]" of a court (*United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 431-432 (1980) (Rehnquist J., dissenting)), Congress has expressly provided procedures for expedited judicial review of the question that the private appellees contend (Br. 46) had already been decided by Judge McGarr—the constitutionality of imposing labor protection conditions on the abandonment.

The private appellees' related due process argument (Br. 48-49) is without merit for the same reasons. Congress has exercised its legislative power to regulate interstate commerce, and appellees are now free to pursue, through the judicial process, their claim that the effect of that exercise of power constitutes an uncompensated taking of their property.

c. The private appellees' contention (Br. 55-60) that the labor protection provisions of the Rock Island Act amount to an imposition of retroactive liability that violates the Due Process Clause is predicated on their view that these provisions impose a wholly new obligation from which they were effectively immunized prior to passage of the Act. As we have explained above (pages 3-5, *supra*), that is an erroneous premise.

The fact that the Rock Island investors had no assurance that employee protection conditions would not be imposed upon an abandonment of their railroad lines distinguishes this case from *Railroad Retirement Board* v. *Alton R. R.*, 295 U.S. 330 (1935), and *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Indeed, in *Turner* the Court upheld the federal statute against a due process challenge even though it accepted the possibility that liability for black lung benefits was being imposed on coal mine operators who might have carried out their operations "in reliance upon the current state of the law, which imposed no liability on them for disabling pneumoconiosis." *Id.* at 17. Thus, *Alton* does not control this case, even assuming its continued vitality, and this is a is more compelling case than *Turner* for upholding the statute against a due process retroactivity challenge.

But even assuming that the Rock Island Act, like the statute in *Turner*, has "some retrospective effect" (428 U.S. at 16), it does not violate the Due Process Clause. The Act is a rational exercise of Congress' broad powers under the Commerce Clause and, as explained above (pages 4-5, *supra*), reflects a national policy from which the Rock Island's owners benefited during years when the railroad was attempting to sustain its operations. See 428 U.S. at 18-19.

4. Appellants agree with the government that the Rock Island Act does not effect an unconstitutional taking of property because the Tucker Act would provide just compensation if a taking were to be found (Br. 31-32). Appellants contend (Br. 25-29), however, that, because of the existence of that remedy, the Court should not now reach the taking question. On the other hand, the private appellees agree with the government (Br. 66-68) that this Court should reach the taking question, but they contend (Br. 61-66) that the availability of the Tucker Act remedy does not eliminate the Just Compensation Clause violation that they allege.

a. For the reasons stated in our opening brief (Br. 18-20), the Court should resolve the taking question at this stage, as it did in similar circumstances in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 147-148, 149-150 n.36 (1974), with respect to the question whether offering stock in exchange for rail properties constituted a taking. The reorganization court has held that the imposition of labor protection provisions constitutes a taking regardless of how modest the cost of the plan ultimately agreed upon by the Trustee and the unions or devised by the Commission (see J.S. App. 5a-6a, 18a-19a). That is a purely legal conclusion, and since the maximum extent of the estate's liability under the Rock Island Act is fixed by the statute, there is nothing to be gained by awaiting further factual development. Compare *Hodel* v. *Virginia Surface Mining & Reclamation Association, supra*, slip op. 30-31. There is, however, a strong public interest in a final determination of the taking question now.

b. There is no merit to the private appellees' contention (Br. 62-63) that *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), supports the proposition that, despite the availability of the Tucker Act remedy, the Rock Island Act may nonetheless be enjoined as an unconstitutional taking. *Youngstown* concerned an action unauthorized by any statute. The Court then had serious doubts that the Tucker Act would apply to such unauthorized action (343 U.S. at 585), and it has since concluded (*Regional Rail Reorganization Act Cases, supra*, 419 U.S. at 127 n.16, quoting *Hooe* v. *United States*, 218 U.S. 322, 336 (1910)) that " '[t]he taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government,' and hence recovery is not available in the Court of Claims."[6]

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[6]We agree with the private appellees (Br. 61) that the availability of the Tucker Act remedy would not cure constitutional infirmities of

The private appellees' allegations (Br. 63-64) of irreparable injury take little account of their concession elsewhere (Br. 39) that, because of the Act's provision for a federal loan of up to $75 million to pay the costs of an employee protection plan, it cannot be expected that "the present cash position of the estate" will be depleted. Moreover, the various other injuries about which the private appellees speculate are finally translatable into economic loss and thus are not beyond monetary remedy. The fact that the estate may have an "uncertain claim" subject to litigation (see Pvt. App. Br. 63) surely does not constitute a circumstance unique to this particular bankruptcy proceeding. In any event, if this Court rules on the taking question, then the estate will not face an "uncertain claim" under the Tucker Act. Either there is *no* taking, in which case the estate will be liable for the employee protection plan in an amount determined by the expedited procedures established by Congress, or there *is* a taking, in which case the estate will enjoy a certain right to full reimbursement for the costs of the plan.

Finally, the private appellees contend (Br. 64) that this case is no different from any case in which "citizens with available funds" are ordered by Congress "to pay [a] public expense," with the proviso that they can later seek reimbursement under the Tucker Act. This assertion is frivolous. Such a law undoubtedly would be struck down as a violation of due process if there were no rational connection between the citizen charged with this obligation and the public expense in question. The employees who would benefit from the labor protection provisions at issue here, however, are not strangers having no connection with the Rock Island Railroad, and the Rock Island is hardly an

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other kinds. As we have argued above (pages 5-9, *supra*), however, the private appellees' other constitutional claims are insubstantial.

innocent bystander saddled with a wholly unexpected obligation. The employees are individuals who spent part of their work lives in an industry plagued with a persisting problem of partial and total line abandonments and who may now, as a result of their employment with the Rock Island, lack the skills needed for employment in different kinds of work in more affluent sectors of the economy. The labor protection provisions of the Rock Island Act represent a rational legislative judgment that properly takes that factor into account.

CONCLUSION

For the foregoing reasons, and for those stated in our opening brief, the judgment of the court of appeals in No. 80-1239 should be reversed, and the order of the district court in No. 80-415 should be vacated as moot.

Respectfully submitted.

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